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Review of the efficiency of the administrative and financial functioning of the United Nations

Information-sharing practices between the United Nations and national law enforcement authorities, as well as referrals of possible criminal cases related to United Nations staff, United Nations officials and experts on mission

Report of the Secretary-General

I. Introduction

1. The present report has been prepared pursuant to paragraph 19 of General Assembly resolution 62/247, on strengthening investigations, in which the Assembly requested the Secretary-General to submit to the Assembly a report on the practices relating to the sharing of information between the Organization and law enforcement authorities of Member States as well as to referrals to such authorities of possible criminal cases related to United Nations staff, United Nations officials and experts on mission, taking into account its resolution 62/63 and other relevant legal instruments. Similar issues were addressed in the report of the Secretary-General on the criminal accountability of United Nations officials and experts on mission, submitted pursuant to resolution 62/63 (A/63/260).

II. Legal basis for cooperating with law enforcement authorities of Member States

2. Section 21 of the Convention on the Privileges and Immunities of the United Nations adopted by the General Assembly on 13 February 1946 (hereinafter "the General Convention") stipulates that the United Nations should cooperate at all times with the appropriate authorities of Members to facilitate the proper administration of justice, secure the observance of police regulations and prevent the occurrence of any abuse in connection with the privileges, immunities and

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facilities mentioned in article V of the General Convention. Accordingly, the Organization strives, to the extent possible, to cooperate with the law enforcement authorities of Member States.

3. Moreover, in addition, United Nations officials, in accordance with the Staff Regulations and Rules of the United Nations, and experts on mission, pursuant to the regulations governing the status, basic rights and duties of officials other than Secretariat officials, are required to comply with local laws and honour their private legal obligations. In addition, the model status-of-forces agreement for peacekeeping operations provides that the United Nations peacekeeping operation and its members should respect all local laws and regulations and that the special representative/commander should take all appropriate measures to ensure the observance of those obligations (see A/45/594, annex).

III. Sources of privileges and immunities of the United Nations, its officials and experts on mission

4. Article 105, paragraph 1, of the Charter of the United Nations provides that the Organization should enjoy in the territory of each of its Members such privileges and immunities as were necessary for the fulfilment of its purposes. Article 105, paragraph 2, provides that representatives of the Members of the United Nations and officials of the Organization should similarly enjoy such privileges and immunities as were necessary for the independent exercise of their functions in connection with the Organization. In order to give effect to Article 105 of the Charter, the General Assembly adopted the General Convention, to which, currently, 154 Member States are parties and bound thereby.

5. The following sections are set out under article II of the General Convention, with regard to the privileges and immunities of the United Nations itself and its archives:

> "Section 2. The United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity. It is, however, understood that no waiver of immunity shall extend to any measure of execution.
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> Section 3. The premises of the United Nations shall be inviolable. The property and assets of the United Nations, wherever located and by whomsoever held, shall be immune from search, requisition, confiscation, expropriation and any other form of interference whether by executive, administrative, judicial or legislative action.
>
> Section 4. The archives of the United Nations, and in general all documents belonging to it or held by it, shall be inviolable wherever located."

6. Under article V, section 18 (a), the General Convention provides that officials of the United Nations should be immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity. In addition to the immunities and privileges specified in section 18, section 19 of the General Convention provides that the Secretary-General and all Assistant Secretaries-General should be accorded in respect of themselves, their spouses and

minor children, the privileges and immunities, exemptions and facilities accorded to diplomatic envoys, in accordance with international law.

7. For the purposes of the privileges and immunities granted under the General Convention, the term "officials of the United Nations" was defined by the General Assembly in its resolution 76 (I) of 7 December 1946. In that resolution, the General Assembly approved "the granting of privileges and immunities referred to in article V ... to all members of the staff of the United Nations, with the exception of those who are recruited locally and are assigned to hourly rates". Therefore, all staff members of the United Nations, regardless of nationality, residence, place of recruitment or rank, are considered officials, with the sole exception of those who are both recruited locally and assigned to hourly rates. Furthermore, United Nations Volunteers may enjoy privileges and immunities as "officials of the United Nations" when specifically provided for in such agreements as status-of-forces agreements and the standard basic assistance agreements of the United Nations Development Programme.

8. Under article VI, section 22 (a), (b) and (c), the General Convention provides that experts (other than officials coming within the scope of article V) performing missions for the United Nations should be accorded such privileges and immunities as are necessary for the independent exercise of their functions during the period of their missions, including the time spent on journeys in connection with their missions. In particular they should be accorded:

> "(a) Immunity from personal arrest or detention and from seizure of their personal baggage;
>
> (b) In respect of words spoken or written and acts done by them in the course of the performance of their mission, immunity from legal process of every kind. This immunity from legal process shall continue to be accorded notwithstanding that the persons concerned are no longer employed on missions for the United Nations;
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> (c) Inviolability for all papers and documents."

9. Individuals having the status of experts on mission may include persons engaged by the Organization on a consultant contract or designated by United Nations organs to carry out missions or functions for the United Nations such as rapporteurs of the Human Rights Council or members of the International Law Commission. Furthermore, in the context of peacekeeping or peace support operations some categories of personnel have the status of experts on mission. These include military observers, military liaison officers, military advisers, arms monitors, members of formed police units, seconded individual United Nations police and seconded corrections officers. The categories of personnel deemed experts on mission are usually provided in the relevant status-of-forces or status-of-mission agreements.

10. In addition, certain types of agreements entered into between the Organization and Member States also grant privileges and immunities to the United Nations consistent with the Charter, such as headquarters agreements with host States and the agreements mentioned above. Some Member States hosting offices of the United Nations have adopted national laws and regulations that provide detailed arrangements for the application of the privileges and immunities of the Organization, its officials and experts on mission in the national context. All those

agreements are therefore sources of legal rules for determining the scope of privileges and immunities in the specific context of the host country.

IV. Practices relating to information-sharing and referrals to national law enforcement officials

11. The two principal situations in which information is passed between the Organization and law enforcement authorities are: (a) when the Organization, through its own investigative processes, has uncovered prima facie evidence of potential criminal conduct within the jurisdiction of one of its Member States and decides to refer that evidence to the Member State for its appropriate action; and (b) when the Organization has been approached by a Member State for access to information or material[1] and/or witnesses in the context of an external investigation by law enforcement authorities and/or criminal proceedings being conducted by the Member State.

A. Referrals of credible evidence of potential criminal conduct to law enforcement authorities of Member States

12. It is the policy of the Organization that officials and experts on mission should be held accountable whenever they commit criminal acts, particularly crimes related to sexual exploitation and abuse, human trafficking, fraud and corruption, not only because of the prejudice or harm caused to the victims but also because they undermine the work and image of the United Nations. To that effect, various measures have been put in place. For example, in the context of sexual exploitation and abuse, the Secretary-General promulgated in section 5 of his bulletin ST/SGB/2003/13 that if, after proper investigation, there was evidence to support allegations of sexual exploitation or sexual abuse, those cases might, upon consultation with the Office of Legal Affairs, be referred to national authorities for criminal prosecution.

13. Consequently, where the Organization, after proper internal investigation using its own investigative processes, establishes credible allegations that reveal that a crime may have been committed by United Nations officials or experts on mission, such allegations are ordinarily brought to the attention of the Member State having jurisdiction over the alleged conduct. Given the legal issues involved in the referral to the relevant State of credible allegations that reveal a crime may have been committed, including issues related to the privileges and immunities of the United Nations under the General Convention, all such cases are reviewed by the Office of Legal Affairs before a final determination is made on any particular referral. In reviewing such cases, the relevant programme managers are consulted, as appropriate, to determine the wider interests of the Organization.

14. The Organization refers credible allegations to law enforcement authorities by providing a written report on such allegations to the permanent mission of the Member State concerned for its appropriate action. In view of the inviolability of

[1] The term "information or material" used throughout the present report includes documents, other property of the United Nations containing such information as computer hard drives and any other property or assets of the United Nations.

United Nations archives, set out in article II, section 4, of the General Convention, the Organization provides the report on the credible allegations to the permanent mission on a voluntary basis, without prejudice to the privileges and immunities of the United Nations or its officials and experts on mission. In this way, the Secretary-General upholds the principle that such cooperation is not the result of, or subject to, any binding judicial process and that his decision on the nature and extent of the cooperation to be extended is a consequence of the determination of the Secretary-General that, in his sole opinion, the cooperation would not in any way prejudice the interests of the Organization. Any follow-up requests for additional information or material and/or access to United Nations officials or experts on mission is generally made by the law enforcement authorities to the United Nations through the relevant permanent mission to the United Nations and are handled in accordance with the procedures outlined below.

B. Cooperation in national investigations by law enforcement authorities and in criminal proceedings

15. Where the law enforcement authorities of a Member State are investigating allegations of criminal conduct, whether of a United Nations official or an expert on mission, and the authorities require access to information or material held by the United Nations or to United Nations officials or experts on mission, the law enforcement authorities request such access in writing.

16. As regards requests for information or material, the Organization reviews the request, taking into account such matters as confidentiality, privilege and practical impediments to the production of the information or material, in addition to any policy considerations which, together, assist in determining the interests of the Organization in releasing the information or material. Once the decision has been made to release the requested information or material, such information or material is generally provided to the law enforcement authorities through the relevant permanent mission to the United Nations. In view of the inviolability of United Nations archives set out in article II, section 4, of the General Convention, the Organization provides the documentary information or material on a voluntary basis, without prejudice to the privileges and immunities of the United Nations. In this way, the Secretary-General upholds the principle that cooperation is not the result of, or subject to, any binding judicial process and that his decision on the nature and extent of the cooperation to be extended depends on his sole opinion of the United Nations interests at stake in the matter.

17. In respect of requests for access to United Nations officials or experts on mission in the context of investigations on matters in which they may have been involved or have knowledge of within the context of their official functions, a similar procedure is followed. Upon receipt of a request, which generally comes through the relevant permanent mission to the United Nations, the Organization reviews the request, taking into account such matters as confidentiality, privilege and practical impediments to the access requested, in addition to any policy considerations which, together, assist in determining the interests of the Organization in authorizing access to the United Nations officials or experts on mission.

18. Pursuant to the General Convention, and as elaborated above, the Organization, its officials and experts on mission are immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity. As a consequence of such functional immunity, once a determination has been made that it is in the interests of the Organization to cooperate with the law enforcement authorities, the United Nations officials or experts on mission are made available on a voluntary basis, without prejudice to the privileges and immunities of the United Nations and those accorded to the officials or experts on mission concerned. In this way, the Secretary-General reinforces the principle that cooperation is not the result of, or subject to, any binding judicial process and that his decision on the nature and extent of the cooperation to be extended is based on his sole determination that cooperation does not prejudice the interests of the Organization. The Member State is also advised that should any formal testimony be required from or formal proceedings commenced against an official or an expert on mission, any further cooperation would require that the Member State address, generally through its permanent mission to the United Nations, a written request to the Organization for a waiver of the privileges and immunities of the individual concerned.

V. Requests by law enforcement authorities for waivers of immunity for the purposes of formal testimony and/or formal proceedings involving a United Nations official or expert on mission

19. If the law enforcement authorities of a Member State require formal testimony or wish to file criminal proceedings against a United Nations official or expert on mission in connection with a matter arising in the context of the official duties of that official or expert, such authorities must make a written request to the Organization, generally through their permanent missions to the United Nations, for the waiver of immunities of the individual concerned.

20. As provided in the Charter, privileges and immunities granted to the United Nations are those deemed necessary for the fulfilment of its purposes. The purpose and scope of privileges and immunities of officials and experts on mission are defined in the General Convention in a manner that takes into account the role of such personnel in the carrying out of activities in pursuit of the purposes of the Organization. Thus, in addition to section 21, article V, section 20, provides the following in respect of officials of the Organization:

> Privileges and immunities are granted to officials in the interests of the United Nations and not for the personal benefit of the individuals themselves. The Secretary-General shall have the right and the duty to waive the immunity of any official in any case where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of the United Nations.

21. Similarly, article VI, section 23, specifies the purposes for which privileges and immunities are granted to experts on mission as follows:

> Privileges and immunities are granted to experts in the interests of the United Nations and not for the personal benefit of the individuals themselves.

> The Secretary-General shall have the right and the duty to waive the immunity of any expert in any case where, in his opinion, the immunity would impede the course of justice and it can be waived without prejudice to the interests of the United Nations.

22. Pursuant to article V, section 20, of the General Convention (in respect of officials) and article VI, section 23 (in respect of experts on mission), the Secretary-General has the right and the duty to waive immunity where, in his opinion, immunity would impede the course of justice and could be waived without prejudice to the interests of the United Nations. Thus, pursuant to the aforementioned provisions of the General Convention and in the interest of maintaining the international character and independence of personnel who serve in the United Nations, whether officials or experts on mission, as well as to ensure that the provisions of the General Convention are applied in a consistent manner and in the interests of the Organization, the decision whether to waive immunity in any particular case is for the Secretary-General alone to make.

23. This interpretation was reaffirmed by the International Court of Justice in its advisory opinion on the difference relating to immunity from legal process of a special rapporteur of the Commission on Human Rights of 29 April 1999 (so-called "Cumaraswamy case"), in which it observed that the Secretary-General, as the chief administrative officer of the Organization, had the primary responsibility to safeguard the interests of the Organization, and that, to that end, it was up to him to assess whether its agents had acted within the scope of their functions and, where he so concluded, to protect those agents, including experts on mission, by asserting their immunity (para. 60). Similarly, consistent with sections 20 and 23 of the General Convention, the Court reaffirmed that it was for the Secretary-General to determine whether the official or expert on mission had acted within the scope of his/her functions.

24. Accordingly, if the Secretary-General determines that the official or expert on mission concerned acted outside the scope of his/her functions, unless the official in question enjoyed privileges and immunities accorded to diplomatic envoys in accordance with article 19 of the General Convention or pursuant to the relevant headquarters agreement, status-of-forces agreement or status-of-mission agreement, the official or expert on mission would not enjoy any immunity and a waiver would not be necessary. In such cases, the law enforcement authorities would be advised in writing, generally through the relevant permanent mission to the United Nations, that no waiver of immunity was required.

25. If, however, the Secretary-General determines that the conduct in question, or the testimony requested, falls within the immunities accorded to the official or the expert on mission concerned, a waiver of immunity may only be provided by the Secretary-General pursuant to sections 20 or 23 of the Convention where, in his opinion, the immunity would impede the course of justice and could be waived without prejudice to the interests of the United Nations. This determination is within the exclusive authority of the Secretary-General. Should the Secretary-General determine that the immunity of the individual concerned could be waived without prejudice to the interests of the Organization, a decision setting forth the scope and purpose of the waiver would be communicated in writing to the Member State.

VI. Conclusion

26. Overall, the United Nations has not experienced in general terms any problems in its cooperation with the law enforcement authorities of Member States in sharing information or material for criminal investigations. There has been a significant increase in the number of requests made to the Organization from law enforcement authorities of Member States for information or material. The United Nations is currently cooperating with the law enforcement authorities in 65 jurisdictions of 28 Member States. Many of the requests are wide in nature and scope, a factor which has generated a significant increase in the workload of the relevant departments and offices of the Organization, in particular the Office of Legal Affairs, which has to manage the Organization's response to the requests for evidentiary material as well as all issues related to the cooperation with Member States under the framework of the Convention on the Privileges and Immunities of the United Nations and other relevant instruments.